

Courts And Regulators Continue To Grapple With Dobbs

Insights

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Courts, regulators, legislators, and health care providers continue to grapple with the aftermath of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. This alert provides a high-level update on federal and state legal developments illustrating the far-reaching implications of *Dobbs* on access to abortion-related services.

Abortion restrictions in Idaho, Texas and Tennessee took effect this week, but litigation remains ongoing in both Idaho and Texas regarding the interaction between their state abortion bans and the federal Emergency Medical Treatment and Labor Act ("EMTALA"). Just this week, federal courts in Idaho and Texas issued decisions that take opposite positions with respect to this interaction.

- As we've [previously shared](#), Texas's Attorney General [sued](#) the Biden administration last month to challenge [HHS guidance](#) on the application of EMTALA in the context of clinically necessary abortion services provided to stabilize an emergency medical condition. This week, the U.S. District Court for the Northern District of Texas ruled in the state's favor, [issuing a preliminary injunction](#) that prevents the federal government from enforcing its EMTALA guidance in Texas or against the suit's other plaintiffs, the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) or the Christian Medical and Dental Association (CMDA). The court ruled that the plaintiffs had a "substantial likelihood of success" on their claims that the guidance exceeded HHS's authority under federal law. According to the court, the guidance "goes well beyond EMTALA's text, which protects both mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict." *Although the litigation remains ongoing, for now, the Biden Administration may not enforce its EMTALA guidance within Texas or against AAPLOG and CMDA member.* Attorney General Merrick Garland has [noted](#) "[t]he Department disagrees with yesterday's decision by the District Court for the Northern District of Texas, which preliminarily enjoins the Centers for Medicare & Medicaid Services' July 11, 2022 guidance on EMTALA and Secretary Becerra's accompanying letter as applied to the plaintiffs in that litigation. We are considering appropriate next steps."
- Reaching a different conclusion, on August 24 the U.S. District Court for the District of Idaho also [granted a preliminary injunction](#), although in the federal government's favor. *The Court held that Idaho is enjoined from enforcing Idaho Code section 18-622 to the extent that the statute conflicts with EMTALA-mandated care.* In particular, the Court found that the state

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law directly conflicts with EMTALA because it is impossible to comply with both statutes and because the Idaho law “frustrates Congress’s intent to ensure adequate emergency care for all patients who turn up in Medicare-funded hospitals[,]” because it will deter emergency care that includes abortions. *Importantly, the ruling still allows Idaho’s law to be implemented in situations outside of EMTALA-mandated care.* Our prior discussion on the Idaho litigation (in which the Department of Justice (DOJ) has sued the State of Idaho, claiming that the state’s near-total ban on abortion is preempted, at least in part, by EMTALA) can be found [here](#).

Federal courts in Idaho and Texas have thus taken opposing views on the interaction between EMTALA and the states’ abortion restrictions. It remains to be seen whether these rulings will be appealed and, if they are, whether the U.S. Supreme Court will provide clearer guidance for providers on how EMTALA interacts with these specific laws.

Another open question, also likely requiring resolution by a court, is whether states have the legal authority to enact outright bans or limitations on medication abortion drugs that have been approved by the U.S. Food and Drug Administration.

- Last week, GenBioPro, a manufacturer of generic drugs, withdrew its challenge in the Southern District of Mississippi challenging the state’s abortion restrictions in an effort to ensure GenBioPro could sell abortion-inducing medications in the state. In its complaint, GenBioPro had argued that the federal rules under which the Food and Drug Administration approved of the drugs preempted the state’s restrictions on such drugs. In explaining its decision to dismiss the suit, GenBioPro [told reporters](#) that it has “decided to adjust [its] strategy.”

Despite so many unsettled areas of law, state lawmakers have quickly mobilized in the months since *Dobbs* was published to develop and pass legislation aimed either at restricting or protecting abortion access, transforming the nationwide abortion landscape into a patchwork of abortion access.

- Some states have introduced measures seeking to restrict abortion access by establishing that the fetus is a legal person or by limiting patient’s access to telehealth services for medication abortion. For example, in Georgia, the state’s Department of Revenue [announced](#) that under Georgia law, “any unborn child with a detectable human heartbeat” is eligible for an income tax dependent election, providing a \$3,000 tax exemption for each pregnancy within a household, even before birth.
- Conversely, we’ve also seen a flurry of state activity seeking to preserve access to abortion. Massachusetts, for instance, passed a [sweeping law](#) on July 29, 2022, that protects providers of abortion services from either criminal or civil actions brought under the law of another state. The law also blocks the governor from extraditing anyone charged in another state for engaging in a “legally-protected health care activity,” which is defined to include reproductive health care services and gender-affirming care that is legal in the state.

Hooper, Lundy & Bookman’s [Reproductive Health Practice Group](#) is monitoring these developments closely and will continue to share updates in this area. Please reach out to Alicia Macklin, Stephanie Gross, Andrea Frey, Katrina Pagonis, or your regular Hooper, Lundy & Bookman contact with any questions.

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